

# CRIMINAL SANCTIONS FOR CARTEL BEHAVIOUR

ANTHONY GRAY\*

## I INTRODUCTION

The Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth) controversially proposes the introduction of criminal sanctions for certain cartel behaviour. These measures were recommended by the Dawson Committee in its 2003 review,<sup>1</sup> and not surprisingly have the support of the Australian Competition and Consumer Commission (ACCC).<sup>2</sup> In this article, I will introduce the proposed new rules,<sup>3</sup> before assessing whether cartel conduct should be criminalised, in terms of traditional conceptions of what behaviour should be considered to be criminal in nature, as well as the likely effectiveness of the new regime in terms of deterring cartel behaviour, and enforcing cartel provisions more generally.

## II OUTLINE OF PROPOSED NEW RULES

Proposed new s 44ZZRF of the *Trade Practices Act 1974* (Cth) will make it an offence for an individual<sup>4</sup> to:

(a) make a contract or arrangement, or arrive at an understanding,<sup>5</sup> with the intention of dishonestly<sup>6</sup> obtaining a benefit,<sup>7</sup> where

---

\* BBus (Acc), LLB (Hons), LLM (QUT), PhD (UNSW), Associate Professor in the School of Law, University of Southern Queensland. Thanks to an anonymous referee for helpful comments on an earlier draft.

<sup>1</sup> *Review of the Competition Provisions of the Trade Practices Act 1974* (2003) (Dawson Review) Trade Practices Act Review <<http://tpareview.treasury.gov.au/content/home.asp>> at 8 November 2008; R Steinwall, 'The Dawson Committee Review of the Competition Provisions of the *Trade Practices Act*' (2003) 11 *Competition and Consumer Law Journal* 87.

<sup>2</sup> Australian Competition and Consumer Commission, *Submission to the Trade Practices Act Review* (2002) Trade Practices Act Review <<http://tpareview.treasury.gov.au/submissions.asp>> at 8 November 2008.

<sup>3</sup> To distinguish between provisions of the *Trade Practices Act 1974* (Cth) and the amendments proposed by the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, the amendments will be referred to as clauses of the *Trade Practices Act 1974* (Cth).

<sup>4</sup> Or corporation (but the focus of the article will be the criminalisation of individual behaviour).

<sup>5</sup> This does not include contracts etc between bodies corporate that are related to each other (*Trade Practices Act 1974* (Cth) cl 44ZZRN).

<sup>6</sup> Dishonesty is defined to be such according to the standards of ordinary people, and known by the defendant to be dishonest according to those standards (*Trade Practices Act 1974* (Cth) cl 44ZZRB); this mirrors definitions of dishonesty in the *Criminal Code 1995* (Cth) s 130(3); *Corporations Act 2001* (Cth), and *Enterprise Act 2002* (UK) s 188 (the criminal cartel provision in that jurisdiction).

(b) the contract, arrangement, or understanding ('the contract etc') contains a cartel provision.

It is also an offence to give effect to the cartel provision with the intention of dishonestly obtaining a benefit.<sup>8</sup> This provision, but not the above provision, applies retrospectively.<sup>9</sup> In the absence in either case of evidence that the individual intended to dishonestly obtain a benefit, the conduct can be punished by the civil penalty provisions.<sup>10</sup>

A cartel provision is one relating to price fixing, restricting outputs in the production or supply chain, allocating customers, suppliers or territories, or bid rigging, by parties that are, or otherwise would be, in competition with one another. A cartel provision must contain both (a) a purpose/effect condition in relation to prices,<sup>11</sup> restriction of supply,<sup>12</sup> customer allocation<sup>13</sup> or bid rigging,<sup>14</sup> and (b) a competition provision, in that at least

<sup>7</sup> According to the proposed definition of 'benefit', it can accrue to another person other than the person charged. It is immaterial that it is actually impossible to obtain the benefit (*Trade Practices Act 1974* (Cth) cl 44ZRH(2)(a)). The acquittal of others accused of making the agreement may in some cases lead to a defence for a corporation or individual charged with these offences: see *Trade Practices Act 1974* (Cth) cl 44ZZRH(2) and (3).

<sup>8</sup> *Trade Practices Act 1974* (Cth) cl 44ZRG(1).

<sup>9</sup> *Trade Practices Act 1974* (Cth) cl 44ZRG (4).

<sup>10</sup> *Trade Practices Act 1974* (Cth) cl 44ZRJ, cl 44ZRK – the maximum penalty is \$500 000 for individuals, and for corporations, \$10 million, or three times the benefit, or where that cannot be ascertained, 10% of annual turnover.

<sup>11</sup> See *Trade Practices Act 1974* (Cth) cl 44ZZRD, that the provision has the purpose, or has or is likely to have the effect, or directly or indirectly (a) fixing, controlling or maintaining the price for, or a discount, allowance, rebate or credit in relation to goods or services supplied, or likely to be supplied, by any or all of the parties to the contract etc, goods or services acquired or likely to be acquired by any or all of the parties to the contract etc; (c) goods or services re-supplied, or likely to be re-supplied, by persons or classes of persons to whom those goods or services were supplied by any or all of the parties to the contract etc; (d) goods or services likely to be re-supplied by persons or classes of persons to whom those goods or services are likely to be supplied by any or all of the parties to the contract etc. It is possible to avoid prosecution for (a)-(c) above by filing a collective bargaining notice with the Commission under *Trade Practices Act 1974* (Cth) cl 93AB(1A) setting out the particulars of the contract, where the notice is in force: *Trade Practices Act 1974* (Cth) cl 44ZZRL(1). Authorisation is also available (*Trade Practices Act 1974* (Cth) cl 44ZZRM), and joint ventures which do not substantially lessen competition may also be exempt (*Trade Practices Act 1974* (Cth) cl 44ZZRO).

<sup>12</sup> If the provision has the purpose, or is likely to have the effect of, directly/indirectly preventing, restricting or limiting the production or likely production of goods by any or all of the parties to the contract etc, the capacity or likely capacity of any or all of the parties to the contract etc, the supply or likely supply of goods or services to the persons or classes of persons by any or all of the parties to the contract etc.

<sup>13</sup> If the provision has the purpose, or is likely to have the effect of, directly/indirectly allocating between any or all of those who have acquired or are likely to acquire services from, or supplied goods or services to, any or all of the parties to the contract etc, allocating geographical areas in which goods or services are supplied, or are likely to be supplied to, or are acquired or likely to be acquired, by or to any or all of the parties to the contract etc.

<sup>14</sup> If the provision has the purpose, or is likely to have the effect of, directly/indirectly ensuring that in the event of a request for bids in relation to the supply or acquisition of goods or services, one or more parties to the contract etc bid, but one or more do not, two or more parties to the contract bid, but at least two of them do so on the basis that one of those bids is more likely to be successful than the others, or that not all of those parties proceed with their bid until the deadline, or that at least two proceed on the basis that one of those bids is more likely to be successful than the others, or that at least one bid is worked out in accordance with the contract etc.

two of the parties to the contract, arrangement or understanding are or are likely to be, or but for the contract etc would be, in competition with one another.<sup>15</sup>

An offence committed by an individual is punishable on conviction by a maximum gaol term of five years, or a fine of \$220 000, or both.<sup>16</sup> The penalty for a breach of cl 44ZZRF or cl 44ZZRG by a corporation is a fine not exceeding the greatest of the following:

(a) \$10 million;

(b) if the court can determine the benefits obtained by one or more persons and are reasonably attributable to the offence, three times that value;

(c) if the court cannot make the assessment referred to in (b), 10% of the corporation's annual turnover.<sup>17</sup>

The proposed criminalisation of cartel conduct in Australia mirrors developments in other countries. Since 1890, the *Sherman Act* (United States) has provided for gaol terms for those individuals involved in price fixing. Originally the maximum punishment was a one year gaol term and a fine of \$5000. Today the individual can be gaoled for up to 10 years, and can be personally fined up to \$1 million; a corporation can be fined up to \$100 million.<sup>18</sup> The average prison sentence for a United States citizen convicted of an antitrust violation is 22 months.<sup>19</sup> The United Kingdom has also recently criminalised cartel behaviour.<sup>20</sup>

### III SERIOUSNESS WITH WHICH CARTEL BEHAVIOUR IS VIEWED

The Organisation for Economic Co-Operation and Development (OECD) has labelled cartel behaviour as among 'the most egregious violations of competition law'.<sup>21</sup> It has identified that cartels offer no legitimate economic or social benefits that might justify them. They lead to a reduction in output and an increase in the price above a market equilibrium level, causing customers to purchase less of the cartel product and to pay more for what they do purchase. This results in a misallocation of resources and reduces efficiency.<sup>22</sup> It shelters cartel members from full exposure to market forces, meaning they have less incentive to control costs and to be innovative. An OECD survey between 1996 and 2000 found that the amount of commerce affected by just 16 cartel

<sup>15</sup> The concept of 'in competition with one another' is variously defined in *Trade Practices Act 1974* (Cth) cl 44ZZRD(3) to include in competition in relation to supply, in relation to acquisition, or in relation to production.

<sup>16</sup> *Trade Practices Act 1974* (Cth) cl 44ZZRF(3), cl 44ZZRG(3); again the second provision applies retrospectively: cl 44ZZRG(4).

<sup>17</sup> *Trade Practices Act 1974* (Cth) cl 44ZZRF(2) and cl 44ZZRG(2); in the period ending at the end of the month in which the corporation committed, or began committing, the offence.

<sup>18</sup> *Antitrust Criminal Penalty Enhancement and Reform Act* (2004) (United States).

<sup>19</sup> W Kolasky, 'Criminalising Cartel Activity: Lessons from the United States Experience' (2004) 12 *Competition and Consumer Law Journal* 207.

<sup>20</sup> *Enterprise Act 2002* (UK) ss 40 and 188.

<sup>21</sup> OECD, *Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels* (1988).

<sup>22</sup> OECD, *OECD Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws* (2002) 76; A Gray, 'Patrolling Price Fixing in Petroleum Markets' (2007) 35 *Australian Business Law Review* 398.

cases reported exceeded US\$55 billion worldwide.<sup>23</sup> The OECD estimates that on average cartels producing overcharging amounting to 10% of the affected commerce, and cause overall harm of 20% of affected commerce.<sup>24</sup> These figures may be conservative.<sup>25</sup>

As indicated, maximum gaol terms in the United States have increased for cartel behaviour. In the United Kingdom, gaol terms for cartel behaviour have been imposed under the *Enterprise Act 2002* (UK).<sup>26</sup> Although the maximum fine for price fixing is more than 40 times higher than it was when the Act was first introduced in Australia, it does not seem to have deterred price fixing behaviour.<sup>27</sup> Other countries have also imposed criminal sanctions for cartel behaviour. Thus, it is understandable that the Australian Government should be considering the introduction of criminal penalties as has occurred elsewhere.

#### IV NATURE OF A CRIME

Given that the proposals criminalise behaviour that in the past has not been viewed as criminal in nature, it is sensible to consider where we do (or should) draw the line between behaviour that is deemed criminal and that which is not. There are other contexts in which the line between civil and criminal can or has become blurry.<sup>28</sup> We should consider what characterises behaviour that we generally consider to be criminal. Here different theories compete in providing justification. These theories include:

(a) utilitarianism – punishment is only justified to the extent that its costs are outweighed by its benefits, in terms of deterrence of this offender or other would-be offenders, or community education and awareness or other more general benefits.<sup>29</sup>

<sup>23</sup> OECD, above n 22, 72; refer also to D Fletcher, 'The Lure of Leniency: Maximising Cartel Deterrence in Light of *La Roche v Empagran* and the Antitrust Criminal Penalty Enhancement and Reform Act of 2004' (2005) 15 *Transnational Law and Contemporary Problems* 342, 343-4; G Harrison and M Bell, 'Recent Enhancements in Antitrust Criminal Enforcement: Bigger Sticks and Sweeter Carrots' (2005) 6 *Houston Business and Taxation Law Journal* 206, 221.

<sup>24</sup> OECD, above n 22, 77; J Connor and R Lande, 'How High do Cartels Raise Prices? Implications for Reform of the Antitrust Sentencing Guidelines' (Working Paper, American Antitrust Institute, 2005); B Sweeney, 'The Role of Damages in Regulating Horizontal Price Fixing: Comparing the Situation in the United States, Europe and Australia' (2006) 30 *Melbourne University Law Review* 837, 838-40.

<sup>25</sup> C Leslie, 'Trust, Distrust and Antitrust' (2004) 82 *Texas Law Review* 515.

<sup>26</sup> In 2006, sentences for 19 individuals were imposed totalling 449 years, and an overall average term of imprisonment of 27.3 months: G Summers, 'Under Attack' (2007) *New Law Journal* 12/10/07. Section 188 of the *Enterprise Act 2002* (UK) is very similar in terms to the proposed new Australian provision, focussing on price fixing, limiting production or supply, market sharing and bid rigging. Refer to J Joshua, 'The European Cartel Enforcement Regime Post-Modernization: How is it Working?' (2006) 13 *George Mason Law Review* 1247.

<sup>27</sup> D Round and L Hanna, 'Curbing Corporate Collusion in Australia: The Role of Section 45A of the *Trade Practices Act*' (2005) *Melbourne University Law Review* 242.

<sup>28</sup> For example, punitive damages, a civil remedy, are designed to punish the wrongdoer for conduct deemed to be especially blameworthy. Assault can carry both criminal and civil consequences. Civil detention is sometimes provided for in so-called preventive detention legislation, which allows for the detention of someone who has committed certain violent crimes in the past, if there is a fear they will do so again. See for example the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).

<sup>29</sup> J Bentham, *An Introduction to the Principles of Morals and Legislation* (Clarendon Press, 1907); J S Mill, *Utilitarianism* (1861); J W Harris, *Legal Philosophies* (Butterworth, 1980) 49.

(b) retribution – the idea that a person should suffer because of, and in proportion to, his/her moral wrongdoing.

### A *Utilitarianism and the Punishment of Competition Law Breaches*

A typical utilitarian would not be in favour of criminalising cartel behaviour. Given their belief that the best way to resolve a problem is the one that preserves the most societal resources,<sup>30</sup> the utilitarian would be greatly concerned with the costs involved in bringing criminal proceedings against an alleged cartel participant, and the cost of imprisoning them if they were convicted. Against these costs, they would wish to balance the benefits or costs saved through the supposed deterrent impact of gaol terms on criminal behaviour.<sup>31</sup> However, since the evidence connecting gaol terms with deterrence is at best tentative, the utilitarian would conclude that fines would be a better way to deter planned cartel behaviour because of the much lower enforcement costs.<sup>32</sup> They might also point out the relatively lower gaol terms served by those convicted of white collar crimes, compared with other crimes.<sup>33</sup> Most utilitarians would agree that individuals are rational cost-benefit calculators;<sup>34</sup> this would lead them to conclude that

<sup>30</sup> C Wray, 'Corporate Probation Under the New Organisational Sentencing Guidelines' (1992) 101 *Yale Law Journal* 2017, 2019-20; J Kaplan et al, *Criminal Law: Cases and Materials* (Aspen Publishers, 4<sup>th</sup> ed, 2000) 34; M Block, 'Optimal Penalties, Criminal Law and the Control of Corporate Behaviour' (1991) 71 *Baltimore University Law Review* 395.

<sup>31</sup> L Seidman, 'Soldiers, Martyrs and Criminals: Utilitarian Theory and the Problem of Crime Control' (1984) 94 *Yale Law Journal* 315, 316. 'A central tenet of the utilitarian theory of crime control is that resources should be devoted to crime prevention only up to the point at which the marginal cost of prevention equals the marginal cost of the crime prevented'; rehabilitation and incapacitation are also goals of utilitarianism but deterrence tends to be given the most prominence, certainly by law and economics scholars.

<sup>32</sup> However, there are also question marks over the effectiveness of fines in deterring price fixing behaviour: 'The penalties imposed to date in Australia appear to have failed to slow down the incidence of price fixing, at least on the measure of court cases' (the authors refer also to evidence of recidivism, as does S Coronos in 'Penalties for Price-Fixing: A Built-in Feature of How We Do Business in Australia?' (1996) 24 *Australian Business Law Review* 160, 163); Round and Hanna, above n 26; D Round, J Seigfried and A Baillie, 'Collusive Markets in Australia: An Assessment of their Economic Characteristics and Judicial Penalties' (1996) 24 *Australian Business Law Review* 292 also note the lenient penalties given, and claim there is 'distinct sympathy ... for firms which enter agreements to end price wars' (301); J Lindgren in the *Roche Vitamins case* (ACCC v *Roche Australia Pty Ltd* (2001) 23 ATPR 41-809) referred in setting the penalty to the need to deter such behaviour by the offending company and others (41-615), and noted that the penalties imposed in that case 'either exceeded or were a significant percentage of the estimated profit figures and that they were also a significant percentage of even the sales figures' (42,815), but it is less clear that financial penalties will in fact deter. See also the references to the need for deterrence, particularly in price fixing cases, by J Heerey in *ACCC v McPhee and Son (Australia) Pty Ltd* (1998) ATPR 41-628, 40-891 and 40-892.

<sup>33</sup> C Emigholz, 'Utilitarianism, Retributivism and the White Collar-Drug Crime Sentencing Disparity: Toward a Unified Theory of Enforcement' (2006) 58 *Rutgers Law Review* 583, 591-4; J Gustafson, 'Cracking Down on White Collar Crime: An Analysis of the Recent Trend of Severe Sentences for Corporate Officers' (2007) 40 *Suffolk University Law Review* 685; J S Dutcher, 'The Justifications for Harsher Punishment of White-Collar and Corporate Crime' (2005) 37 *Arizona State Law Journal* 1295.

<sup>34</sup> R Posner, *Economic Analysis of Law* (Little, Brown and Company, 3<sup>rd</sup> ed, 1986) 206; R Posner, 'Optimal Sentences for White Collar Criminals' (1980) 17 *American Criminal Law Review* 409, 410; R Posner, 'An Economic Theory of the Criminal Law' (1985) 85 *Columbia Law Review* 1193; M Stucke, 'Morality and Antitrust' (2006) *Columbia Business Law Review* 443, 484-6; G Calabresi and D Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review* 1089, 1126; G Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 *Journal of Political Economy* 169.

the penalties for breach of the cartel provisions multiplied by the probability of being detected must be greater than the benefit that would be expected to be had from cartel behaviour, in order that the fine system would be effective.<sup>35</sup> Sometimes, the debate is in terms of optimal rather than absolute deterrence, but this is not such an issue in the context of criminalising price fixing.<sup>36</sup>

One difficulty in assessing the validity of these arguments is the lack of hard data on the extent to which the existence of criminal sanctions does in fact deter planned cartel behaviour. The above philosophy assumes it is possible to accurately weigh up the costs of enforcement against the benefits of deterrence, yet the extent to which deterrence is a product of criminal sanctions remains open. As the OECD acknowledges:

Anecdotal evidence exists that criminal sanctions against individuals can have deterrent effects. There is, however, no systematic empirical evidence available to prove such effects, and to assess whether the marginal benefit of introducing sanctions against individuals (in the form of less harm from cartel activity) exceeds the additional costs that in particular a system of criminal sanctions entails (including the costs of prosecution as well as of administering the prison system). There appears to be agreement that it would be virtually impossible to generate the relevant data.<sup>37</sup>

However, there is some support for the value of gaol terms as a deterrent in this context,<sup>38</sup> with one writer concluding:

Our experience in the United States has taught us that criminal sanctions are absolutely essential to effective cartel enforcement. There is no more effective deterrent to cartel behaviour than the knowledge that, if caught, the individuals involved will have to serve gaol terms ... there is no other effective way to persuade lower level employees to co-operate in an investigation and to supply evidence that will incriminate their superiors, their employers and their co-conspirators. The ability to offer a participant in a cartel either immunity from prosecution or a reduced sentence in exchange for testimony is the prosecutor's single strongest weapon in cartel enforcement.<sup>39</sup>

<sup>35</sup> This assumption has been criticised on the basis that many criminals, including corporate criminals, do not think they will be caught or do not consider what they are doing to be criminal: J Darley, 'On the Unlikely Prospect of Reducing Crime Rates by Increasing the Severity of Prison Sentences' (2005) 13 *Journal of Law and Policy* 189, 204.

<sup>36</sup> This is because optimal deterrence is more relevant where the social benefits of the behaviour are weighed against the cost; since price fixing has no social benefit at all (one of the reasons it is viewed so seriously), optimal deterrence is not relevant in our context here.

<sup>37</sup> OECD, *Cartels: Sanctions Against Individuals* (2005) 7; Stucke, above n 34, 470: 'It is unknown, however, whether the significant increases in maximum fines and terms of incarceration have significantly reduced the number of illegal cartels'; D Kahan, 'Social Influence, Social Meaning and Deterrence' (1997) *Virginia Law Review* 349, 361. The ACCC relied on the deterrence effects in arguing for the criminalisation of cartel behaviour: ACCC, *Submission to the Trade Practices Review* (Public Submission 50, 2002) 35.

<sup>38</sup> J Recine, 'Examination of the White Collar Crime Penalty Enhancements in the Sarbanes-Oxley Act' (2002) 39 *American Criminal Law Review* 1535; J S Dutcher, 'The Justifications for Harsher Punishment of White-Collar and Corporate Crime' (2005) 37 *Arizona State Law Journal* 1295; J Braithwaite, 'White Collar Crime' (1985) 11 *Annual Review of Sociology* 1; M Silverfarb, 'Justifying Punishment for White-Collar Crime: A Utilitarian and Retributive Analysis of the Sarbanes-Oxley Act' (2004) 13 *Boston University Public Interest Law Journal* 95; D Baker, 'The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid Rigging' (2001) 69 *George Washington Law Review* 693.

<sup>39</sup> Kolasky, above n 19.

However, many researchers have commented on the difficulties in proving that greater criminal penalties do in fact deter would-be offenders, at least in the context of white collar crime generally.<sup>40</sup> This has been backed by empirical research in the specific context of corporate crime.<sup>41</sup> This may be because offenders do not think they will be caught or are not aware of the penalties.<sup>42</sup> Whether the assumption that would-be colluders actually do consciously weigh up benefits and expected costs is realistic is also highly contentious, even if it could be assumed would-be colluders could accurately assess the estimated benefits, as well as the likely penalties if caught, and the probability of being caught.<sup>43</sup> It leads Emigholz to conclude that ‘utilitarian ideals do not actually form the foundation for white-collar sentences, although they do seem to be a part of the sentence determination’.<sup>44</sup>

However, despite the literature strongly doubting the ability of penalties to deter undesirable behaviour,<sup>45</sup> there is express reference to the need for deterrence mentioned

<sup>40</sup> K Schlegel, D Eitle and S Gunkel, ‘Are White Collar Crimes Overcriminalised? Some Evidence on the Use of Criminal Sanctions Against Securities Violators’ (2001) 28 *Western State University Law Review* 117, 121; G Lynch, ‘The Role of Criminal Law in Policing Corporate Misconduct’ (1997) 60 *Law and Contemporary Problems* 23, 34. ‘If what we are seeking is primarily a means of reducing the frequency of acts that have harmful consequences – of deterring and controlling crime – then the choice between criminal and civil modalities is essentially a matter of efficiency. Civil modes of punishment will generally be preferable from this perspective’; W Barnes Jr, ‘Revenge on Utilitarianism: Renouncing a Comprehensive Economic Theory of Crime and Punishment’ (1999) 74 *Indiana Law Journal* 627, 631-2; Darley, above n 35, 189; P Robinson and J Darley, ‘The Role of Deterrence in the Formulation of Criminal Law Rules: At its Worst When Doing its Best’ (2003) 91 *Georgetown Law Journal* 949; A Doob and C M Webster, ‘Sentence Severity and the Crime: Accepting the Null Hypothesis’ in M Tonry (ed), *Crime and Justice: A Review of Research* (2003) 143; E Szockyj, ‘Imprisoning White Collar Criminals?’ (1999) 23 *Southern Illinois University Law Journal* 485, 495; Gustafson, above n 33; T Castellano, ‘Limits of the Criminal Sanction in Controlling Crime: A Plea for Balanced Punishments’ (1999) 23 *Southern Illinois University Law Journal* 427; M Block, F Nold and J Sidak, ‘The Deterrent Effect of Antitrust Enforcement’ (1981) 89 *Journal of Political Economy* 429; J Clarke and M Bagaric, ‘The Desirability of Criminal Penalties for Breaches of Part IV of the *Trade Practices Act*’ (2003) 31 *Australian Business Law Review* 192; Coronos, above n 32.

<sup>41</sup> D Weisburd, E Waring and E Chayet, ‘Specific Deterrence in a Sample of Offenders Convicted of White Collar Crimes’ (1993) 33 *Criminology* 587 (there is no reason to think that deterrence in the antitrust context would work differently than deterrence in the context of corporate crime more generally); Block, Nold and Sidak, above n 40.

<sup>42</sup> D Anderson, ‘The Deterrence Hypothesis and Picking Pockets at the Pickpocket’s Hanging’ (2002) 4 *American Law and Economics Review* 295, 302-4; Robinson and Darley, above n 40, 204; Stucke, above n 34, 484.

<sup>43</sup> K Yeung, ‘Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective’ (1999) 23 *Melbourne University Law Review* 440, 453; D Round, ‘Consumer Protection: At the Mercy of the Market for Damages’ (2003) 10 *Competition and Consumer Law Journal* 1, 33. Criminal sanctions pose a further unknown in terms of placing a dollar value on loss of freedom or stigma associated with prison: J Clarke, ‘Criminal Penalties for Contraventions of Part IV of the *Trade Practices Act*’ (2005) 10(1) *Deakin Law Review* 141, 151. Others have suggested ways to improve the deterrent effect: Robinson and Darley, above n 40, 989-1001.

<sup>44</sup> Emigholz, above n 33, 611.

<sup>45</sup> In the context of the existing civil regime, some have lamented that the penalties as applied in Australia to breaches of the competition rules have not in fact deterred anti-competitive conduct: Finkelstein J in *ACCC v ABB Transmission and Distribution Ltd* (2001) ATPR 41-815: ‘If general deterrence is the principal object of imposing a penalty, the number of cases that still come before the court, and the seriousness of the conduct that is involved in some of them, suggests that past penalties are not achieving that object’ (42,938); Round and Hanna, above n 26, 267: ‘the penalties imposed to date in Australia appear to have failed to slow down the incidence of price fixing’; Clarke,

in the Act itself,<sup>46</sup> (at least in the context of determining an appropriate punishment), as well as several cases considering appropriate penalties following proven breaches of the competition laws. *I must acknowledge that these references occurred in the context where the penalties being referred to were civil in nature. I must also acknowledge they occur in the context of assessing a penalty, not in the context of assessing whether behaviour is criminal or not.* For example, French in *TPC v CSR* said:

Punishment for breaches of the criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation. Neither retribution nor rehabilitation, within the sense of the Old and New Testament moralities that imbue much of our criminal law, have any part to play in economic regulation of the kind contemplated by Part IV ... The principal and ... probably the only object of the penalties imposed by s76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravener and by others.<sup>47</sup>

In a similar vein, Finkelstein J in the *ACCC v ABB Transmission and Distribution Ltd* case declared the object of general deterrence should be seen as the fundamental goal of sentencing.<sup>48</sup> Deterrence was also referred to in the *Roche Vitamins* case as a reason for high penalties.<sup>49</sup>

Given the strength of the evidence suggesting that the introduction of criminal penalties has little or no effect on the rate of commission of such crimes, it is difficult to justify the introduction of criminal penalties for cartel behaviour on a utilitarian theory of criminal law.

## B *Retribution and the Punishment of Competition Law Breaches*

A retributive theory of criminal law requires that a person should suffer because of, and in proportion to, the moral wrongdoing felt by society towards the behaviour.<sup>50</sup> In the present context, criminalisation of white collar crime represents a recognition that it is a breach of the social contract, and a reflection of community condemnation of the conduct. As Morris puts it:

(I)t is just to punish those who have violated the rules and caused the unfair distribution of benefits and burdens. A person who violates the rules has something others have – the benefits of the system – but by renouncing what others have assumed, the burdens of self-restraint, he has acquired an unfair advantage. Matters are not even until this advantage is in some way erased ... he owes something to others, for he has something that does not

---

above n 43, 150: ‘it is unlikely that any financial penalty alone ... could provide an effective deterrent because, to do so, it would need to be so high as to be impossible in practice’.

<sup>46</sup> *Trade Practices Act 1974* (Cth) s 76(1).

<sup>47</sup> (1991) ATPR 41-076, 52,152.

<sup>48</sup> (2001) ATPR 41-758, 44, 945; refer also to *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285; *ACCC v George Weston Foods Ltd* [2000] FCA 690; *ACCC v ABB Power Transmission Pty Ltd* [2004] FCA 819; *ACCC v D M Faulkner Pty Ltd* [2004] FCA 1666.

<sup>49</sup> (2001) 23 ATPR 41-809, 42,812.

<sup>50</sup> J W Harris, *Legal Philosophies* (Butterworth, 1980) 49; I Kant, *The Metaphysics of Morals* (1785); I Kant, *The Philosophy of Law* (Hastie trans, 1887) and Hegel (*Philosophy of Right* (Knox trans, 1942)) are leading proponents of retributive theory. After a thorough analysis of different types of crime, and discussion of the suggested distinction between *malum in se* and *malum prohibitum* crimes, Green concludes that ‘violation of some regulatory laws can ... constitute morally wrongful conduct’: S Green, ‘Why It’s a Crime to Tear the Tag Off a Mattress: Overcriminalisation and the Moral Content of Regulatory Offenses’ (1997) 46 *Emory Law Journal* 1533, 1610.



rightfully belong to him. Justice – that is punishing such individuals – restores the equilibrium of benefits and burdens, by taking from the individual what he owes, that is, exacting the debt.<sup>51</sup>

There is also support in the case law for the retribution theory in relation to competition law (again in the context of setting a penalty), even when the only penalties are civil in nature. Goldberg J in *ACCC v Australian Safeway Stores*,<sup>52</sup> referring to the comments of French J in *CSR*, said he could not find any other references apart from this case to suggest that the purpose of penalties in the *Trade Practices Act 1974* (Cth) was not punishment. Similarly, Heerey J in *ACCC v McPhee and Son (Australia) Pty Ltd* stated he did not necessarily agree with the comments of French J, concluding that although at that time the penalties in the Act were not criminal:

Nevertheless s76 imports into the penalty fixing process concepts of moral responsibility long known to the criminal law. In other words, the sources of the substantive provisions in Part IV are doubtless economic policy and theory, but the penalties for contraventions are to be applied in a moral universe.<sup>53</sup>

Yeung says that most of the factors used in assessing the (civil) penalty are more aligned to the retribution rather than deterrence theory.<sup>54</sup>

There is some support for this theory of criminalising white collar conduct in the literature.<sup>55</sup> Stucke is one of these, and in doing so he acknowledges the limitations of the utilitarian philosophy:

If policy makers assume that the federal antitrust laws are concerned solely with allocative efficiency and are essentially amoral, then efforts to deter such conduct through criminal sanctions may be self-defeating. Criminal law, as many legal scholars have argued, reveals society's moral opprobrium to certain conduct. That moral component (through internalising the standard of conduct and the attendant guilt or fear of shame) can be effective in deterring socially unacceptable conduct. But to harness that moral component, antitrust policy makers should re-examine certain policies underlying antitrust law. To date, antitrust policymakers, enforcers, and scholars have largely encamped in utilitarianism and the economic theory of optimal deterrence, whereby general deterrence is achieved through the right mixture of financial penalty and incarceration to offset the profit maximiser's expected cartel gains. But it is unclear whether that alone will effectively deter cartel behaviour. Instead, fostering a moral component to antitrust crimes may more effectively deter these violations at a lower social cost, encourage other nations to increase their prosecution of cartel behaviour, and prevent antitrust from slipping into irrelevancy.<sup>56</sup>

<sup>51</sup> H Morris, 'Persons and Punishment' (1968) 52 *The Monist* 475, 478.

<sup>52</sup> (1997) ATPR 41-562, 43, 811.

<sup>53</sup> *ACCC v McPhee and Son (Australia) Pty Ltd* (1998) ATPR 41-628. Yeung concludes that both theories are in evidence in the Australian case law: Yeung, above n 43, 443.

<sup>54</sup> Yeung, above n 43, 473.

<sup>55</sup> K Schlegel, *Just Deserts for Corporate Criminals* (Northeastern University Press, 1990); G Geis and M Blankenship, 'Is Incarceration an Appropriate Sanction for the Nonviolent White-Collar Offender?' in C Fields and S Egger (eds), *Controversial Issues in Corrections* (1999) ch 10; G Binder, 'Democracy and Punishment: Punishment Theory: Moral or Political?' (2002) 5 *Buffalo Criminal Law Review* 321; Emigholz, above n 33, 611: 'the relatively light sentences that white-collar criminals receive thus may be based on retributive ideology'.

<sup>56</sup> Stucke, above n 34, 449.

Others have made the link between morality and crime, in terms of a breach of a moral code,<sup>57</sup> or a power to create social harm.<sup>58</sup> Green identifies three elements to a crime, focussing on morality and other issues:

- (a) the moral wrongfulness of the action itself, where community consensus is that the behaviour is immoral;
- (b) the actor's culpability or blameworthiness, having regard to their intent; and
- (c) the action's social harmfulness.<sup>59</sup>

I now consider how cartel behaviour can be judged in relation to these criteria.

### 1 *Moral Wrongfulness of the Action Itself*

Is deliberate cartel behaviour morally wrong? Of course, morality is a subjective thing, and it can be very difficult to obtain community consensus as to what is moral and what is not.<sup>60</sup> This moral difficulty is one of the reasons given by Castle and Writer for not supporting criminal sanctions for cartel behaviour:

Community values change and criminality can be a fluid notion. What you may regard as criminal, another person may regard as being merely egregious and offensive. Without general community consensus that egregious anti-competitive conduct is criminal and ought to be punished rather than deterred, it may be appropriate that such commercial contraventions continue to be penalised civilly ... rather than introduce a regime of criminal sanctions.<sup>61</sup>

On the other hand, there is historical support for viewing cartel type behaviour as being morally reprehensible. A parable in the book of Samuel in the Old Testament refers to a wealthy man with great flocks of sheep who killed the one sheep owned by a rival. King David ordered the death of the wealthy man, and four times payment to the owner of the sheep killed.<sup>62</sup> In ancient Greece, corn dealers convicted of fixing prices were given the death penalty.<sup>63</sup> Price fixing was also punished in medieval England.<sup>64</sup> Reference to the requirement of honest business practices also appears in Judaism and Islam.<sup>65</sup>

<sup>57</sup> J Muncie, 'The Construction and Deconstruction of Crime' in J Muncie and E McLaughlin (eds), *The Problem of Crime* (2001) 7, 12.

<sup>58</sup> S Henry and D Milanovic, *Constitutive Criminology: Beyond Postmodernism* (Sage Publications Ltd, 1996).

<sup>59</sup> Green, above n 50, 1537.

<sup>60</sup> Examples include current debate on the legal status of surrogacy, stem cell research, abortion, pornography, and gay marriage.

<sup>61</sup> L Castle and S Writer, 'More Than a Little Wary: Applying the Criminal Law to Competition Regulation in Australia' (2002) 10 *Competition and Consumer Law Journal* 1, 23-4. The authors say that corporate crimes 'simply do not yet give rise to the personal horror that we equate with so many other criminal acts against people and property' (23).

<sup>62</sup> S Weber Waller, 'The Incoherence of Punishment in Antitrust' (2003) 78 *Chicago-Kent Law Review* 207, 215.

<sup>63</sup> L Kotsiris, 'An Antitrust Case in Ancient Greek Law' (1988) 22 *International Law* 451, 454.

<sup>64</sup> W Letwin, *Law and Economic Policy in America* (University Press, 1965) 18-52; W Letwin, 'The English Common Law Concerning Monopolies' (1954) 21 *University of Chicago Law Review* 355; D Dewey, 'The Common Law Background of Antitrust Policy' (1955) 41 *Virginia Law Review* 759.

<sup>65</sup> References collected in Stucke, above n 34, 499-500.

Given the amount of loss caused to consumers by (detected) cartel activity, concerns over whether the conduct is morally wrong enough to be a crime seem misplaced. Consumers pay much higher prices than would be the case if the cartel were not in operation. It is difficult to justify treating it less seriously than stealing.<sup>66</sup> Fraud occurs when a person acts 'dishonestly',<sup>67</sup> and this is a requirement of the new cartel offence. Stealing is a fraudulent taking of the property of another.<sup>68</sup> Why is the behaviour of a person engaged in cartel behaviour not equated with either of these offences, to the extent of the difference between what the consumer pays, and what they would pay if the cartel did not exist?<sup>69</sup> Many other provisions of the *Trade Practices Act 1974* (Cth) carry with them the possibility of criminal sanction,<sup>70</sup> though they may not carry either the 'personal horror' to which others refer as a test for behaviour that should be considered criminal.

I do not find convincing arguments that cartel behaviour is not morally wrong, because 'unlike other cases of theft, the victims (and society overall) are often unaware of being fleeced'.<sup>71</sup> Surely, the awareness of the victim that activity has occurred should not determine whether the activity is criminal in nature. A related observation is that white collar crime differs from other crime in that victims are less readily identifiable.<sup>72</sup> Again, while I do not argue with this statement, this does not (and should not) necessarily mean that the conduct is non-criminal in nature.

There may be a concern that juries might be reluctant to find an accused guilty of criminal cartel behaviour,<sup>73</sup> and so prosecutors might be reluctant to devote resources to running many prosecutions. This has not been the experience in the United States and, writing of the recent introduction of criminal sanctions for cartel behaviour in several European countries, Robert Lane observes 'we now have a number of courts and juries satisfied of anti-competitive conduct to a criminal standard of proof and prepared to punish accordingly. The cultural abhorrence of the application of the criminal law to the field in Europe may be dissipating'.<sup>74</sup>

The moral wrongfulness of cartel, or any other anti-competitive, behaviour may of course be lessened if the offender were to go to authorities of their own volition and confess their behaviour. In this context, it is expected that the ACCC's current leniency policy, whereby those first to disclose the existence of wrongdoing are generally immune from ACCC action, will be applied in the new context of criminal sanctions for price fixing behaviour. These policies also make it more likely that the existence of a

<sup>66</sup> It seems that the s 4 definition of fraud in the *Fraud Act 2006* (UK) includes cartel behaviour: Summers, above n 26.

<sup>67</sup> *Criminal Code 1899* (Qld) s 408C(1).

<sup>68</sup> *Criminal Code 1899* (Qld) s 391(2); fraud requires, for example, that the offender intend to permanently deprive the owner of possession of it.

<sup>69</sup> Lynch agrees, concluding that 'many corporate crimes fit comfortably within traditional criminal law categories of intentional harm to persons or property': Lynch, above n 40, 49.

<sup>70</sup> Eg *Trade Practices Act 1974* (Cth) s 75AZC (false representations); s 75AZJ (bait advertising); s 75AZK (referral selling) and s 75AZO (pyramid selling).

<sup>71</sup> Stucke, above n 34, 495.

<sup>72</sup> Castle and Writer, above n 61, 22.

<sup>73</sup> Perhaps because, as Castle and Writer argue, with price fixing 'such conduct may not be regarded as truly criminal by some sections of Australian society': *ibid*.

<sup>74</sup> R Lane, 'European Union Law' (2007) 56(2) *International and Comparative Law Quarterly* 422.

cartel will be discovered, and are for this reason also consistent with the new regime.<sup>75</sup> The ACCC<sup>76</sup> and OECD have recognised the importance of a sound leniency policy to increase detection of cartel behaviour, and the interplay between criminal regimes and such an approach. ‘Strong sanctions against enterprises and individuals increase the effectiveness of leniency programs in uncovering cartels and provide incentives to cartel participants to co-operate with a cartel investigation’.<sup>77</sup>

## 2 *Blameworthiness and Intent*

The proposed definition of criminal cartel behaviour in the Australian bill is confined to cases where it can be proven that the accused dishonestly intended to obtain a benefit. Most would consider this to be highly blameworthy behaviour, deserving of some legislative response. The offence would not apply to cases where the accused has inadvertently or innocently become involved in cartel behaviour. This would be more an issue in cases where the crime of cartel involvement did not depend on proof of intention.<sup>78</sup>

## 3 *Social Harmfulness*

As I have noted above, the OECD has estimated that the existence of a cartel imposes costs averaging 20% of the cost of affected commerce, and just 16 cartels studied affected US\$55 billion in commerce. It causes sub-optimal allocation of resources, and distorts supply and demand for affected products. It strikes at the heart of competition in markets. There is no redeeming feature about price fixing.<sup>79</sup>

# V OTHER ARGUMENTS FAVOURING THE NEW BILL

## A *Facilitates International Enforcement*

There has been growing recognition around the world of the seriousness of cartel behaviour. Following the position of the United States, other countries including Canada, France, Ireland, Germany, Norway, Austria, Japan and the United Kingdom

<sup>75</sup> Further discussion about the effectiveness of a leniency policy in conjunction with antitrust enforcement appears in Joshua, above n 26; G Spratling, ‘Detection and Deterrence: Rewarding Informants for Reporting Violations’ (2001) 69 *George Washington Law Review* 798; Fletcher, above n 23, 341; Harrison and Bell, above n 23.

<sup>76</sup> ACCC, *Leniency Policy for Cartel Conduct* (2003).

<sup>77</sup> OECD, *Report on the Nature and Impact of Hard Core Cartels* (2002) 2; L Gustafson, B Collins and B McKay, ‘Criminal Consequences of Anti-competitive Conduct’ (2004) 45 *South Texas Law Review* 89, 100-10; Spratling, above n 75.

<sup>78</sup> For example, s 1 of the *Sherman Act 1890* (US), which criminalises cartel involvement without mention of the question of the accused’s intention. However, the *Sherman Act* may defacto operate in the same way as the proposed Australian provision, in that there is evidence that in cases where the accused was not aware of, or understand the consequences of, their actions, the enforcement authority will not prosecute them criminally: United States Department of Justice Antitrust Division Manual ch III c5 (3<sup>rd</sup> ed, 1998).

<sup>79</sup> J Coffee uses the similar distinction in contrasting criminal and civil law between sanctions that seek to ‘price’ and those that seek to ‘prohibit’ the disfavoured behaviour. The latter is appropriate where the actions have no social utility; here the victim is said to have a moral right to be free of the defendant’s conduct: J Coffee, ‘From Tort to Crime: Some Reflections on the Criminalisation of Fiduciary Breaches and the Problematic Line Between Law and Ethics’ (1981) 19 *American Criminal Law Review* 117; J Coffee, ‘Paradigms Lost: The Blurring of the Criminal and Civil Law Models – And What Can be Done About It’ (1992) 101 *Yale Law Journal* 1875.

also criminalise such behaviour. Given that cartel behaviour may well be operating across national borders, it makes sense that there is some international coherency of approach in dealing with such conduct.<sup>80</sup> Co-operation between national bodies can enhance the prospects of catching and successfully prosecuting those engaged in such behaviour. Given that the extradition process generally only works in relation to one country if the offender is currently in a country that also recognises the conduct as criminal,<sup>81</sup> enforcement is assisted as more countries define cartel behaviour as criminal.

## B Improvement Over Previous Australian Proposals

Proposals from the *Dawson Review* attracted serious criticism.<sup>82</sup> Areas of controversy (acknowledged in the *Review* itself) included:

- (a) the confinement of the provisions to 'serious cartel conduct'
- (b) reservations about a 'dishonesty' element of the offence, on the grounds it may give jurors difficulties.

The Government at the time made clear that ACCC guidelines would supplement the new law, limiting criminal enforcement to cases where 'significant amounts of commerce were affected', however defined. It also made clear its intention to limit the types of 'benefits' which could result in a prosecution.<sup>83</sup>

I agree that the distinguishing feature between price fixing conduct that is criminal and price fixing conduct that is punishable by civil penalties should be upon the question of intent, upon which much of our criminal law is based, rather than upon the question of how much commerce was affected, or what kind of benefit obtained. This is consistent with the moral underpinnings of the criminalisation of cartel behaviour discussed earlier. The moral culpability involved does not depend on how much benefit was obtained. The size of the organisations involved is surely irrelevant to questions of criminality.<sup>84</sup>

Others have argued that the proposed new provision is flawed in its reliance on the concept of dishonest obtaining of a benefit, based on community standards and what the accused can be taken to know. Recent criticisms have included that:<sup>85</sup>

- (a) such a test is 'not a touchstone of serious harm or serious culpability' and dishonesty can include very minor as well as very major fraudulent acquisition;

<sup>80</sup> D Klawiter, 'Criminal Antitrust Comes to the Global Market' (1999) 13 *St John's Journal of Legal Commentary* 201; D Klawiter, 'After the Deluge: The Powerful Effect of Substantial Criminal Fines, Imprisonment and Other Penalties in the Age of International Cartel Enforcement' (2001) 69 *George Washington Law Review* 745.

<sup>81</sup> See for example: *Extradition Act 1988* (Cth) s 7.

<sup>82</sup> See for example: Castle and Writer, above n 61, 4-10.

<sup>83</sup> Australian Treasurer, 'Criminal Penalties for Serious Cartel Behaviour' (Press Release, 2 February 2005).

<sup>84</sup> In its initial submission to the *Dawson Review*, the ACCC claimed that criminal sanctions should be confined to 'large corporations', however defined.

<sup>85</sup> C Beaton-Wells and B Fisse, 'Criminalising Serious Cartel Conduct: Issues of Law and Policy' (2008) 36 *Australian Business Law Review* 166, 183-5; B Fisse, 'The Cartel Offence: Dishonesty?' (2007) 35 *Australian Business Law Review* 235, 241-6.

(b) the test of dishonesty, based on ‘standards of ordinary people’, is ‘an undefined and indefinable populist notion the practical application of which will create difficulties for judges and juries, as well as people in business and their advisers’;

(c) the test is subjective which will allow large and sophisticated corporations to deny liability;

(d) an accused might rely on mistake of law as a way of denying that their conduct was dishonest;

(e) jurors may face difficulties if corporations and executives put forward denials of dishonesty based on plausible economic or other justifications for price fixing or other alleged conduct;

(f) the ‘dishonesty’ requirement may create difficulties for extradition laws which typically require dual criminality;<sup>86</sup>

(g) there are other ways of limiting a cartel offence to serious cartel conduct.<sup>87</sup>

By way of response, in many contexts dishonest intention is relevant to assessment of what is criminal and what is not.<sup>88</sup> It is expected that whether the dishonesty was ‘very minor’, ‘very major’, or somewhere in between would be relevant to the question of sentence, rather than whether or not a crime has occurred. If the test of dishonesty be thought a difficult one, the United Kingdom enforcement body has not experienced difficulty in prosecuting a similar provision.<sup>89</sup> It is not submitted that use of the ‘standards of ordinary people’ is contentious, when our criminal system is based on an assessment of guilt by members of a jury, whose purpose is to judge behaviour according to those same standards in applying criminal law to facts. Further, any jury hearing an alleged case of, for example, price fixing would surely be made aware of the extremely serious view taken of such behaviour, which has no redeeming features. Given this, I doubt that a jury would be convinced to acquit based on ‘plausible economic or other justifications for price fixing’.<sup>90</sup> This would not make the behaviour

<sup>86</sup> I accept that one of the consequences of the ‘dishonesty’ requirement is that it may limit extradition enforcement; however I believe that the philosophical link between criminality and dishonest intention is stronger.

<sup>87</sup> One suggestion that Beaton-Wells and Fisse have is to limit proscribed behaviour to cases of intention to increase bargaining power at the expense of those with whom the cartel deals (Beaton-Wells and Fisse, above n 85). However, the counter argument is that this unduly narrows the prohibition, when price fixing behaviour has no redeeming features and primarily hurts customers.

<sup>88</sup> For example offences in the *Criminal Code 1995* (Cth) and *Corporations Act 2001* (Cth).

<sup>89</sup> It is true that the American provision does not expressly require dishonesty, however as pointed out earlier (see discussion around footnote 77), in practice the American authorities do not bring criminal proceedings if they believe that the accused may not have been aware of the behaviour or its criminal consequences; in this way a defacto defence of mistake of law already operates in this context elsewhere.

<sup>90</sup> These might include, for example, that the price fixers thought it was necessary to maintain full employment, reasonable return on investment, or to correct oversupply in the market. If there were evidence that juries were acquitting someone accused in this context if they ‘justified’ their behaviour in this way, perhaps an amendment to the law would be called for, to make clear that the prosecution did not depend on a lack of business justification for the behaviour. I believe this is already implied, but perhaps the legislation should make it express.

honest. There is no justification for price fixing in the eyes of the law. It is per se unlawful.

I would suggest that issues such as how much commerce was affected, as well as others such as how senior the offender was, whether he/she took a leading or passive role in the arrangement, over what time frame the cartel operated, the estimated gains to participants from the arrangement, how many participants, whether the arrangements had an international or purely local scope, and other factors would be relevant to the penalty imposed following proof of the offence, rather than whether or not the offence was committed. Further, as the *Dawson Review* conceded, it is extremely difficult to draw the line between what is 'serious' or hard-core cartel behaviour, and what is not. This should lead us to abandon this concept as being of little use in framing up the criminal provision.

I am in agreement also then that there should be a requirement to prove intention to dishonestly obtain a benefit. It removes the possibility that somebody could unwittingly be caught up in such arrangements, and mirrors the provisions of United Kingdom legislation.<sup>91</sup> It is an appropriate *discrimen* to be used in assessing whether behaviour is criminal. It is not considered necessary to define more closely what the 'benefit' must be, who must obtain it, and from whom it must be derived.

### C      *Unavailability of Other Means of Enforcement*

Another argument why price fixing must be dealt with in this way is that it is inherently unlikely that any of the victims of the price fixing arrangement will seek to obtain redress by private remedy. They are not likely to be aware of the price fixing arrangement in the first place, and it may be cost prohibitive for them to bring action anyway. The fact there are likely to be a large number of victims, for any one of whom enforcement would be practically very difficult, might suggest the need for public sanctions for this kind of behaviour, including criminal sanctions.<sup>92</sup>

## VI      CONCLUSION

I support the proposals to criminalise cartel behaviour in Australia. Cartel behaviour is economically detrimental to society. While the case cannot be made on existing evidence that such a proposal will actually reduce the extent of cartel behaviour, and so may not be justified on utilitarian theory, the case stands on a stronger footing if it is argued that cartel behaviour is morally wrong, and is morally equivalent to other kinds of behaviour that are generally considered to be criminal in nature. The proposal draws stronger support from a retributive theory of criminal law. We should also take into account the blameworthiness of the conduct, and the absence of any social benefits. There is reference to retribution in other trade practices case law in Australia.

In terms of the actual proposals, the provisions are an improvement on previous suggestions, in that they require proof of dishonesty, which finds support in other areas of criminal law. Such laws have been workable in other jurisdictions. The new proposals properly do not include consideration, in terms of whether behaviour is

---

<sup>91</sup> *Enterprise Act 2002* (UK).

<sup>92</sup> Lynch, above n 40, 35.

criminal or not, of its scale. The new proposals will facilitate international enforcement of cartel provisions, and can work consistently with the ACCC's leniency policy to deliver maximum benefits and increased detection of such behaviour.